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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 389

INSURANCE COMPANY OF NORTH AMERICA,
Petitioner

v.

W. V. KEELING, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Finis E. Cowan
John C. Held
Perry O. Barber, Jr.
Counsel for Petitioner
1600 Esperson Building
Houston, Texas 77002

Alpha Law Brief Co., M & M Bldg., Houston, Texas 77002

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

The opinion of the Court of Appeals, printed in Appendix A, *infra*, at 9, is reported in 360 F.2d 88. The order of the District Court (R. 63) was entered without opinion.

JURISDICTION

The judgment of the Court of Appeals was entered on January 11, 1966. (R. 76, Appendix A, *infra*, at 22) Petition for rehearing was denied on May 2, 1966. (R. 102, Appendix A, *infra*, at 15) Jurisdiction rests on 28 U.S.C., §1254(1).

QUESTION PRESENTED

Whether federal jurisdiction depends on what the defendant subsequently decides to claim in his counterclaim?

STATUTE INVOLVED

The statutory provision involved is 28 U.S.C. §1332, as amended, 28 U.S.C. §1332 (1958).[1]

> §1332. Diversity of citizenship; amount in controversy; costs
>
> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—
>
> (1) citizens of different States;

STATEMENT

Respondent, Keeling, injured his eye and back in two distinct accidents while working in Texas for Hunt Oil Company, which is insured by the petitioner, Insurance Company of North America. Pursuant to the Texas Workmen's Compensation Law, Art. 8306-09,[2] respondent filed a separate claim for each injury with the Texas Industrial Accident Board against the petitioner insurance company claiming the "compensation due me under Work-

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[1] Act of July 25, 1958, 72 Stat. 415.

[2] All citations are to Vernon's Annotated Texas Statutes.

men's Compensation Law of Texas." (R. 17, 26) In each claim he alleges that he had suffered an injury to a particular part of his body which had affected other parts of his body and that the full extent of the injury was not yet known. (R. 17, 26) These allegations raised the issue of whether respondent was totally and permanently incapacitated so as to be entitled to the maximum recovery under the law of $35.00 per week for 401 weeks, or a total of $14,035 for each claim.[3] After an administrative hearing the Board decided that petitioner would be disabled for 100 weeks as a result of the eye injury and 52 weeks as a result of the back injury and accordingly made an award of $3,500 in the eye case and $1,820 in the back case. (R. 4, 5) Pursuant to Art. 8307, §5, petitioner timely gave separate notices of its intention not to abide the Board's award and timely filed this diversity case in the United States District Court to set aside the award, alleging that respondent was claiming recovery of benefits for total and permanent incapacity in excess of $10,000, but denying that respondent was entitled to recover such amounts as the Board had awarded. (R. 1). Respondent, who also was dissatisfied with the back award, timely gave notice of his intention not to abide the Board's award on his back claim, and two days subsequent to the filing of this suit filed an action in the state court to set aside the back award and to recover in that court the lump sum

[3] There is no question but that the back injury (R. 26) would support an award of $14,035 maximum. The eye injury (R. 17) is a so-called specific injury for which the respondent under ordinary circumstances could recover a maximum of $35.00 per week for 100 weeks, or a total of $3,500. Art. 8306 §12. However, despite this statutory limitation, the Texas cases hold that when a specific injury extends to and affects the body generally—as respondent alleged in his eye claim (R. 17)—then an injured employee may be entitled to the maximum recovery of $14,035. Texas Employers' Ins. Ass'n. v. Espinosa, 367 S.W.2d 667 (Tex. 1963).

equivalent of $9,835 plus interest. (R. 36)[4] Respondent did not appeal the eye award. Then on August 4, 1964, respondent moved to dismiss petitioner's federal court suit on the ground that the value of the "amount in controversy" was only $9,485, the amount named in his counterclaim. (R. 7, 13) Just as is true of the allegations of respondent's claim before the Board and his claim in the state court suit the allegations of the counterclaim were broad enough to support a judgment for the $14,035 maximum.[5] The District Court held that the matter in controversy in the federal action was less than $10,000, without elaborating the basis for its conclusion. (R. 63) The Court of Appeals affirmed, holding that the matter in controversy in the federal action was only $9,485, the amount named in repondent's counterclaim. In so holding, the Court of Appeals relied on Hardware Mut. Cas. Co. v. McIntyre, 304 F.2d 566 (C.A. 5), cert. denied, 371 U.S. 878 (1962)[6] and its progeny[7] which have reached

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[4] The respondent's prayer in the state court action (R. 39) asked for the lump sum equivalent of $9,835 which, under Texas law, would amount to a recovery of $10,190 before the lump sum discount, if a jury awarded a lump sum discount.

[5] Respondent alleged 171 weeks of total incapacity. (R. 13) Under Texas law this would put into issue 171 weeks of total incapacity and 171 weeks of partial incapacity. Texas General Indemnity Co. v. Savell, 348 S.W.2d 202 (Tex.Civ.App. 1961, no writ hist.). Thus the amount involved on the back award alone is $11,970. Although the counterclaim (R. 13) did effectively limit the respondent's recovery on the eye award alone by dropping the allegations that the injury to the eye extended to and affected other parts of his body generally, the counterclaim (R. 13-14) contained a paragraph which alleged that the back and the eye injury combined together to cause total disability unlimited as to time. This under Texas law puts the $14,085 maximum into issue.

[6] For convenience the opinion of the Court of Appeals in the McIntyre case is printed in Appendix B, infra, at 24.

[7] Hart v. United States Fid. & Guar. Co., 304 F.2d 572, (C.A. 5), cert. denied, 371 U.S. 878 (1962); Standard Acc. Ins. Co. v. Aguirre,

the conclusion that federal jurisdiction depends on what the defendant subsequently decides to claim in his counterclaim on the basis of their reading of the meaning of this Court's decision in Horton v. Liberty Mut. Ins. Co., 367 U.S. 348 (1961).

REASONS FOR GRANTING THE WRIT

1. Clearly the decision of the court below presents an important question of federal jurisdiction and procedure. If *Horton* means that federal jurisdiction can be defeated by a defendant's counterclaim then jurisdiction can be conferred by counterclaim. Thus a person who suffers $1,000 damages in an automobile accident can sue in federal court for that amount, if his opponent had potential damages of more than $10,000 on the same accident, since the opponent's claim will be barred by Rule 13(a) of the Federal Rules of Civil Procedure, 28 U.S.C.A., if he fails to assert it. Expressing doubts that this result will be reached by this Court, Professor Wright has nevertheless suggested this meaning of *Horton*. 1 Barron & Holtzoff, Federal Practice and Procedure §24, at 46 (Wright Supp. 1966). Such a result would have far-reaching effects on the federal compulsory counterclaim rule.

2. The Court of Appeals for the Fifth Circuit has misconstrued the decision of this Court in *Horton*.[8] The decision in *Horton* that a federal district court has jurisdiction of a suit to set aside an award of the Texas Industrial Accident Board was a frank recognition of the

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304 F.2d 879 (C.A. 5), cert. denied, 371 U.S. 878 (1962); Jekel v. Fireman's Fund Ins. Co., 318 F.2d 321 (C.A. 5, 1963).

[8] As suggested supra n. 5 and accompanying text, it has, in the instant case, erroneously applied even its own McIntyre rule.

nature of such suits under Texas law.[9] It was another example of this Court's refusal to shut its mind to what "[a]ll others can see and understand." Bailey v. Drexel Furn. Co., 259 U.S. 20, 37 (1922). Thus in *Horton* this Court did not hold, as some have suggested,[10] that federal jurisdiction depends on what the plaintiff anticipates the defendant will claim, and it surely did not hold that federal jurisdiction depends on what the defendant subsequently does claim. In the *McIntyre* case, however, the majority of the court below held that this Court, in *Horton*, changed the prior rule that jurisdiction is determined from the complaint, with the consequence that thereafter a defendant could defeat federal jurisdiction by (1) denying that he will seek more than $10,000 in federal court and (2) making an affirmative claim for compensation for a sum which does not exceed $10,000. (Appendix B, infra, at 30) The change was inferred by the court below from the language of this Court in *Horton* reflecting that the injured worker there had failed to do either.

The opposing construction is set forth in the dissenting

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[9] It is clear under Texas law that the filing of a suit to set aside an award of the Board renders the Board's award a nullity. Booth v. Texas Employers' Ins. Ass'n, 123 S.W.2d 322 (Tex. 1938). Since this is true, the suit inevitably brings into play much more than the right of the insurer to be free of the award. For not only is the worker compelled by Rule 13(a) of the Federal Rules of Civil Procedure, 28 U.S.C.A., to counterclaim for benefits, under Texas law he loses his right to compensation if he does not either (1) counterclaim in federal court or (2) file a separate suit in state court within the time prescribed in Art. 8307 §5. If the injured workman does neither before the time limits expire and the insurer then dismisses his federal suit, the workman has lost his right to compensation. Hardware Mut. Cas. Co. v. Clark, 360 S.W.2d 921 (Tex.Civ.App. 1962, error dism'd.).

[10] Horton v. Liberty Mut. Ins. Co., 367 U.S. 348, 355 (1961) (Clark, J., dissenting); 1 Barron & Holtzoff, op. cit. supra, at 45.

opinion of Judge Hutcheson in *McIntyre*. (Appendix B, *infra*, at 34) That position is that the complaint of the insurance carrier determines federal jurisdiction unless the amount in controversy stated by it is found to a legal certainty not to be stated in good faith. This was the well established rule prior to *Horton;* it is the rule announced in *Horton*. And no matter how laudible the desire to rid the federal courts of workmen's compensation cases, *e.g.*, Kay v. Home Indemnity Co., 337 F.2d 898 (C.A. 5, 1964), the rule should be adhered to. It is one thing for Congress to prohibit the filing of suits to set aside state compensation awards in federal court. It is quite another, for federal courts to distort well settled jurisdictional and procedural principles in order to avoid taking cases over which Congress has conferred jurisdiction. As Chief Justice Marshall said 145 years ago in Cohens v. Virginia, 19 U.S. (6 Wheat.) 90, 114 (1821):

> It is most true, that this court will not take jurisdiction if it should not; but it is equally true, that it must take jurisdiction, if it should. The judiciary cannot, as the legislature may, avoid a measure, because it approaches the confines of the constitution. . . . With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Finis E. Cowan
John C. Held
Perry O. Barber, Jr.
Counsel for Petitioner

APPENDIX A

Opinion of the Court of Appeals for the Fifth Circuit

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 22026

THE INSURANCE COMPANY OF NORTH AMERICA, *Appellant,*

versus

W. V. KEELING, *Appellee.*

Appeal from the United States District Court for the Eastern District of Texas.

(January 11, 1966.)

Before RIVES, WISDOM, and GEWIN, Circuit Judges.

WISDOM, Circuit Judge: The Insurance Company of North America brought a diversity suit in the United

States District Court for the Eastern District of Texas to set aside two awards of the Texas Industrial Accident Board. The defendant's pleadings show that the insured's claim in this litigation is for less than the $10,000 jurisdictional amount. 28 U.S.C. §1332. The district court dismissed the action. We affirm.

* * *

W. V. Keeling, the appellee, sustained injuries in two different accidents while in the employ of Hunt Oil Company. He injured his left eye May 30, 1962, and his back March 5, 1962. Keeling filed two separate claims before the Industrial Accident Board neither of which exceeded $10,000. The Board held a single hearing June 16, 1964, for both claims and awarded total disability benefits of $3,500 (100 weeks at $35) for the eye claim and $1,820 (52 weeks at $35) for the back claim. Keeling gave the Board notice of appeal on the award for his back, and filed suit for the back injury July 15, 1964, in the state district court for $9,835, the maximum total disability benefits (281 weeks at $35) warranted by his prior salary. Under Texas law, the filing of this suit abrogated the Board's award under the back claim *Zurich General Accident Co. v. Rodgers*, 1936, 128 Tex. 313, 97 S.W.2d 674; *Texas Reciprocal Ins. Asso. v. Leger*, 1936, 128 Tex. 319, 97 S.W.2d 677. Keeling did not appeal the award under the eye claim, but he filed a state court suit to enforce payment of the award. The insurer sued in the federal court to set aside both awards, alleging that the amount in controversy in each claim was in excess of $10,000. Keeling filed a single pleading, styled "Motion to Dismiss for Want of Jurisdiction, Original Answer and Compulsory Counterclaim" covering both the back and eye injuries. The district court granted the motion to dismiss for want of jurisdiction.

This case is governed by *Hardware Mutual Casualty Co. v. McIntyre*, 5 Cir. 1962, 304 F.2d 566; cert. denied, 371 U.S. 878, 83 S.Ct. 147, 9 L.Ed.2d 115. *McIntyre* established the following test for jurisdictional amount in Texas Workmen's Compensation cases:

> " * * * * * If the insurer alleges that the insured has claimed compensation in excess of $10,000 before the Board and that the insured will claim compensation in excess of $10,000 in the court action to 'set aside' the award, federal jurisdiction exists *unless* the insured [1] denies the allegation that he will seek more than $10,000 in the court action and [2] makes an affirmative claim for compensation for a sum which does not exceed $10,000." 304 F.2d 569-70.

The insured's pleadings meet this test.

Keeling's motion to dismiss and answer deny the insurer's allegation that the amount in controversy in each claim exceeds the jurisdictional amount. His compulsory counterclaim makes affirmative demands for less than $10,000: $5,985 for his eye injury (171 weeks at $35); $3,500 for his back injury (100 weeks at $35) for total disability compensation within the meaning of the Texas Workmen's Compensation Law. These two demands total $9,485. He requests no additional relief in this action.

The insurer attempts to distinguish the insured's pleadings from those filed in the *McIntyre* line of cases[1] on the ground that in each case the claimant's pleadings either expressly waived all benefits in excess of $10,000 or his

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[1] Hart v. United States Fid. and Guar. Co., 5 Cir. 1962, 304 F.2d 572; Standard Acc. Ins. Co. v. Aguirre, 5 Cir. 1962, 304 F.2d 879; Jekel v. Fireman's Fund Ins. Co., 5 Cir. 1963, 318 F.2d 321.

pleadings and prayer effectively limited his recovery to this amount. Here, so the argument runs, the pleadings do not prevent the insured's claiming compensation for *partial* disability that may occur after the "total disability" payment period. This position assumes that these potential partial disability claims are necessarily part of the controversy; defendant's failure to disclaim them compels federal jurisdiction.

This Court developed the *McIntyre* test to apply the principles of *Horton v. Liberty Mutual Insurance Co.*, 1961, 367 U.S. 348, 81 S.Ct. 1570, 6 L.Ed.2d 890. In *Horton*, the insurer filed suit to set aside a Texas Workmen's Compensation award, and the defendant's counterclaim determined the amount in controversy. The Court concluded that in this situation it could determine the amount in controversy from the counterclaim itself, unless it appeared that the amount stated in the complaint was not claimed "in good faith." Justice Black, for the Court, suggested alternative ways that good faith could be shown, among them denial of allegations that the amount in controversy exceeds $10,000 or the disclaimer or surrender of part of the original claim. Applying this decision in *McIntyre*, we held that the insured establishes his good faith by (1) denying that he will seek more than $10,000 in the court action; *and* by (2) stating an affirmative claim for compensation not exceeding $10,000. The insurer's evidence showing the possibility of additional claims that may arise in the future from the same accident in itself will not defeat the workman's showing of good faith. Similarly, the insured's filing of a claim in excess of $10,000 with the Texas Industrial Accident Board or his concurrent state suit demanding more than $10,000 damages will not defeat the insured's good faith denial or legal certainty of his

affirmance in the federal responsive pleading. The Court may require specificity in the amount demanded for a particular portion of the stated claim.[2] And the Court may find from the defendant's judicial admissions that the actual amount he has placed in controversy in the *federal* action is in excess of $10,000.

The appellant would have us extend the *McIntyre* test by requiring that the workman expressly stipulate or agree not to claim in excess of $10,000 in subsequent state actions. We see no reason to extend the *McIntyre* requirements.

Appellant relies on *Great American Insurance Co. v. Cacciola,* W.D. Texas 1963, 213 F.Supp. 303. In that case, the court, in an alternative holding for its finding of jurisdiction, relied on the defendant counsel's statement in open court that his client had the right to pursue a claim in state court in excess of $10,000, notwithstanding a denial of jurisdictional amount in the counterclaim. We have held that looking to the insured's state court claims to rebut defendant's good faith is inconsistent with the *McIntyre test.* Jekel v. Fireman's Fund Ins. Co., 5 Cir. 1963, 318 F.2d 321, rev'g 214 F.Supp. 27.

Finally, the appellant contends that the insured's denial of jurisdictional amount is ineffective in this case since the insured did not repeat in the prayer of the counterclaim, as well as in the motion and answer, that his claim does not exceed $10,000. Although a summary in the prayer of the amount demanded is good practice, such a summary is not critical where, as in this case, the denial of the jurisdictional amount in controversy clearly appears in the defendant's related motion to dismiss or in the

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[2] See Great Am. Ins. Co. v. Cacciola, 213 F. Supp. 303 (W.D. Texas 1963) (counterclaim for $9,600 and unascertained amount of medical expenses in federal court).

defendant's answer. We conclude that defendant has not placed possible future partial disability claims within the controversy of *this* action.[3] The insured's counterclaim for total disability is the only claim involved in this case; the sum of its demands falls short of the required jurisdictional amount.

The judgment is AFFIRMED.

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[3] It was unnecessary for the insured in this case to plead facts concerning medical expenses, since partial disability, to which these have importance, does not appear in the workman's counterclaim. This is true even though the insurer introduced evidence of prospective medical expenses of $1,000 to $1,200 for anticipated surgery to defendant's injured eye. R. 53. Compare Great Am. Ins. Co. v. Cacciola, supra note 2, in which recovery for these expenses was demanded in the counterclaim, and the court did call upon the insured to plead special facts concerning their limitation.

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versus

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Amended and Rehearing Denied.

(May 2, 1966.)

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WISDOM, Circuit Judge: The Insurance Company of North America brought a diversity suit in the United

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This case is governed by *Hardware Mutual Casualty Co. v. McIntyre*, 5 Cir. 1962, 304 F.2d 566, cert. denied, 371 U.S. 878, 83 S.Ct. 147, 9 L.Ed.2d 115. *McIntyre* established the following test for jurisdictional amount in Texas Workmen's Compensation cases:

> " * * * * If the insurer alleges that the insured has claimed compensation in excess of $10,000 before the Board and that the insured will claim compensation in excess of $10,000 in the court action to 'set aside' the award, federal jurisdiction exists *unless* the insured [1] denies the allegation that he will seek more than $10,000 in the court action and [2] makes an affirmative claim for compensation for a sum which does not exceed $10,000." 304 F.2d 569-70.

The insured's pleadings meet this test.

Keeling's motion to dismiss and answer deny the insurer's allegation that the amount in controversy in each claim exceeds the jurisdictional amount. His compulsory counterclaim makes affirmative demands for less than $10,000; $3,500 for his eye injury (100 weeks at $35); $5,985 for his back injury (171 weeks at $35) for total disability compensation within the meaning of the Texas Workmen's Compensation Law. These two demands total $9,485. He requests no additional relief in this action.

The insurer attempts to distinguish the insured's pleadings from those filed in the *McIntyre* line of cases[1] on the ground that in each case the claimant's pleadings either expressly waived all benefits in excess of $10,000 or his

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[1] Hart v. United States Fid. and Guar. Co., 5 Cir. 1962, 304 F.2d 572; Standard Acc. Ins. Co. v. Aguirre, 5 Cir. 1962, 304 F.2d 879; Jekel v. Fireman's Fund Ins. Co., 5 Cir. 1963, 318 F.2d 321.

pleadings and prayer effectively limited his recovery to this amount. Here, so the argument runs, the pleadings do not prevent the insured's claiming additional compensation for medical expenses or partial disability that may occur after the total disability payment period. This position assumes that these potential items are necessarily part of the controversy; defendant's failure to disclaim them compels federal jurisdiction.

This Court developed the *McIntyre* test to apply the principles of *Horton v. Liberty Mutual Insurance Co.*, 1961, 367 U.S. 348, 81 S. Ct. 1570, 6 L.Ed.2d 890. In *Horton*, the insurer filed suit to set aside a Texas Workmen's Compensation award; and the defendant's counterclaim determined the amount in controversy. The Court concluded that in this situation it could determine the amount in controversy from the counterclaim itself, unless it appeared that the amount stated in the complaint was not claimed "in good faith." Justice Black, for the Court, suggested alternative ways that good faith could be shown, among them denial of allegations that the amount in controversy exceeds $10,000 or the disclaimer or surrender of part of the original claim. Applying this decision in *McIntyre*, we held that the insured establishes his good faith by (1) denying that he will seek more than $10,000 in the court action; *and* by (2) stating an affirmative claim for compensation not exceeding $10,000. The insurer's evidence showing the possibility of additional claims that may arise in the future from the same accident in itself will not defeat the workman's showing of good faith. Similarly, the insured's filing of a claim in excess of $10,000 with the Texas Industrial Accident Board or his concurrent state suit demanding more than $10,000 damages will not defeat the insured's good faith denial or legal certainty of

his affirmance in the federal responsive pleading. The Court may require specificity in the amount demanded for a particular portion of the stated claim.[2] And the Court may find from the defendant's judicial admissions that the actual amount he has placed in controversy in the *federal* action is in excess of $10,000.

The appellant would have us extend the *McIntyre* test by requiring that the workman expressly stipulate or agree not to claim in excess of $10,000 in subsequent state actions. We see no reason to extend the *McIntyre* requirements.

Appellant relies on *Great American Insurance Co. v. Cacciola,* W.D. Texas 1963, 213 F.Supp. 303. In that case, the court, in an alternative holding for its finding of jurisdiction, relied on the defendant counsel's statement in open court that his client had the right to pursue a claim in state court in excess of $10,000, notwithstanding a denial of jurisdictional amount in the counterclaim. We have held that looking to the insured's state court claims to rebut defendant's good faith is inconsistent with the *McIntyre* test. *Jekel v. Fireman's Fund Ins. Co.,* 5 Cir. 1963, 318 F.2d 321, rev'g 214 F.Supp. 27.

Finally, the appellant contends that the insured's denial of jurisdictional amount is ineffective in this case since the insured did not repeat in the prayer of the counterclaim, as well as in the motion and answer, that his claim does not exceed $10,000. Although a summary in the prayer of the amount demanded is good practice, such a summary is not critical where, as in this case, the denial of the jurisdictional amount in controversy clearly appears in the defendant's related motion to dismiss or in the de-

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[2] See Great Am. Ins. Co. v. Cacciola, 213 F. Supp. 303 (W.D. Texas 1963) (counterclaim for $9,600 and unascertained amount of medical expenses in federal court).

fendant's answer. We conclude that defendant has not placed possible subsequent partial disability compensation or medical expenses within the controversy of *this action*.[3] The insured's counterclaim for his eye injury and total disability is the only claim involved in this case; the sum of its demands falls short of the required jurisdictional amount.

The judgment is AFFIRMED.

ON PETITION FOR REHEARING

The petition for rehearing is denied. However, the Court has amended its original opinion in this case to correct several clerical errors and to clarify its description of the workmen's compensation claims involved.

The Court has also considered the question of prejudgment interest even though the appellant raised it for the first time in the petition for rehearing. The diversity statute limits federal jurisdiction to matters in controversy exceeding $10,000, "exclusive of interest and costs." 28 U.S.C. § 1332. Texas provides for 4 per cent "interest" on accrued installments in workmen's compensation cases. Tex. Civ. Stat. Art. 8306a. The appellant contends that the interest would push Keeling's counterclaim over $10,000; and that this Court has construed an analogous Louisiana insurance statute as in reality providing for the

[3] It was unnecessary for the insured in this case to plead facts concerning medical expenses since they had not been incurred at the time the counterclaim was filed. This is true even though the insurer introduced evidence of prospective medical expenses of $1,000 to $1,200 for anticipated surgery to defendant's injured eye. R. 53. Compare Great Am. Ins. Co. v. Cacciola, supra note 2, in which recovery for these expenses was demanded in the counterclaim, and the court did call upon the insured to plead special facts concerning their limitation.

payment of a "penalty" that must be included in the jurisdictional amount. *Buras v. Birmingham Fire Ins. Co. of Pennsylvania*, 5 Cir. 1964, 327 F.2d 238 (per curiam). We find the *Buras* case distinguishable. The Louisiana statute provides for 6 per cent "interest" for all death claims under insurance policies unpaid 60 days after proof of death. LSA-R.S. 22:656. We interpreted this as a "penalty" for jurisdictional purposes because Louisiana has a regular statutory interest rate of only 5 per cent; and the 6 per cent is not due at all if the insurance contracts are settled within 60 days. In contrast, Texas has a higher regular statutory interest rate—six per cent—than for workmen's compensation installments, Tex. Civ. Stat. Art. 5072, and interest is recoverable in Texas for *all* accrued workmen's compensation weekly installments. Furthermore, the Workmen's Compensation Act contains a separate, specific provision for 12 per cent "penalty" or "damages" for nonpayment of benefits prescribed by an Accident Board ruling. Tex. Civ. Stat. Art. 8307, §5a.

The opinion is reissued as amended according to the corrected copy attached hereto; the petition for rehearing is

DENIED.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1965

No. 22026

D. C. Docket No. 4257-Civil Action

THE INSURANCE COMPANY OF NORTH AMERICA,
Appellant,

versus

W. V. KEELING, *Appellee.*

Appeal from the United States District Court for the Eastern District of Texas.

Before RIVES, WISDOM, and GEWIN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, The Insurance Company of North America, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

January 11, 1966

Issued as Mandate: May 10, 1966

APPENDIX B

Opinion of the Court of Appeals for the Fifth Circuit in the McIntyre Case

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 18557

HARDWARE MUTUAL CASUALTY COMPANY,
Appellant,

versus

ADAM McINTYRE, *Appellee.*

Appeal from the United States District Court for the Eastern District of Texas.

(June 20, 1962)

Before TUTTLE, Chief Judge, HUTCHESON and JONES, Circuit Judges.

TUTTLE, Chief Judge: The single question presented by this appeal is whether the District Court properly dismissed appellant's suit for want of jurisdiction on the ground that the matter in controversy, exclusive of interest and costs, did not exceed the sum of $10,000 as required

by 28 U.S.C. §1332. For the reasons hereafter stated, we affirm the judgment of the District Court.

On January 15, 1960, the appellee, Adam McIntyre, a resident of Texas, was injured while working for his employer in Nome, Texas. The employer's compensation carrier under the Texas Workman's Compensation Law was the appellant, Hardware Mutual Casualty Company, a Wisconsin corporation. On February 25, 1960, the appellee filed a claim with the Texas Industrial Accident Board in which he simply described the circumstances surrounding his injury did not request a specific amount of compensation.[1] On June 20, 1960, the Board awarded the appellee compensation in the amount of $22.01 per week for 15 consecutive weeks commencing January 16, 1960, or a total of $330.15.

The very next day, the appellant filed this suit to "set aside" the award. The complaint alleged generally that the matter in controversy exceeded $10,000, and specifically, that:

> "The claim filed by the defendant for compensation with the Industrial Accident Board of Texas is for total and permanent incapacity . . . and although the claim for compensation is not set out with particularly [with respect to] the amount of money [claimed] . . . [the] amount fixed by law for compensation [for total and permanent incapacity] is a sum which is within the jurisdiction of this Court; . . . ."

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[1] Appellee's claim stated simply that "while he was jacking up a tractor, the jack leg fell, causing the tractor to fall on his left shoulder and right leg." On March 15, 1960, the appellee amended his claim to state the following: "I was taking a wheel off a tractor and it fell on me, breaking my left clavicle and injuring my left shoulder, back and side and causing general injuries to my body."

The source of appellant's dissatisfaction with the award is revealed in the following allegation of the complaint:

> "The plaintiff paid defendant compensation until on or about the 15th day of April, 1960, and suspended and stopped the payment of same because the claimant was then capable and able to do the same type of work as before his alleged injuries and plaintiff so advised the Industrial Accident Board of the State of Texas to such effect and plaintiff is now claiming and does claim that defendant is not entitled to recover for compensation from plaintiff or in the amount as shown and set forth in the above mentioned award of the Industrial Accident Board of Texas. The defendant has been paid for his temporary total incapacity and plaintiff denies that defendant has any residual disability or any loss of earning power or any loss of wage earning capacity."[2]

The complaint prayed for judgment "settting aside" the award and that the appellee "be denied any and all relief by way of compensation."

On July 13, 1960, the appellee moved to dismiss the complaint for want of jurisdiction, alleging that he did not claim "total and permanent incapacity" before the Board, that he did not claim compensation in excess of $10,000 before the Board, and that the amount in controversy thus did not exceed $10,000. On the same day, the appellee filed his answer to the complaint, which contained essentially the same allegations as were contained in his motion to

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[2] In other words, the appellant claims that the award gave the appellee $44.02 too much.

dismiss. The answer further alleged that the appellee "sustained some total disability but that said total disability was not permanent." Also on July 13, 1960, the appellee filed a counterclaim against the appellant wherein he claimed total disability for 100 weeks and partial disability for another 300 weeks. The counterclaim prayed for judgment in the sum of $27 per week for 100 weeks and $21 per week for 300 weeks, or a total of $9,000.

Prior to July 13, 1960, and on June 23, 1960, the appellee had filed a civil action against the appellant in a Texas state court wherein he alleged total disability for 401 weeks. The complaint in the state court prayed for judgment in the sum of $27 per week for 401 weeks plus $2,000 medical expenses, or a total of $12,827.

On August 15, 1960, the District Court granted appellee's motion to dismiss on the grounds (1) that the appellee had not claimed compensation in excess of $10,000 before the Texas Industrial Accident Board and (2) that the appellee had not sought to recover a sum in excess of $10,000 in the instant suit.

Any analysis of the problem here involved must begin with an examination of the Supreme Court's recent decision in *Horton v. Liberty Mutual Insurance Co.*, 367 U.S. 348. That case, as this one, concerned a suit by an insurer to "set aside" an award of the Texas Industrial Accident Board. The award in that case was $1,050. The injured workman had claimed $14,035 before the Board, had instituted a suit in a state court for $14,035, and had counterclaimed in the federal action for $14,035. The Court upheld the jurisdiction of the district court in the following language:

> "We agree with petitioner that determination of the value of the matter in controversy for purposes of federal jurisdiction is a federal question to be

decided under federal standards, although the federal courts must, of course, look to state law to determine the nature and extent of the right to be enforced in a diversity case. It therefore is not controlling here that Texas has held that the crucial factor for allocating its cases among different state courts on an amount-in-controversy basis is the amount originally claimed before its State Compensation Board.

"The general federal rule has long been to decide what the amount in controversy is from the complaint itself, unless it appears or is in some way shown that the amount stated in the complaint is not claimed "in good faith." In deciding this question of good faith we have said that it "must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal." The complaint of the respondent company filed in the District Court, while denying any liability at all and asking that the award of $1,050 against it be set aside, also alleges that petitioner Horton has claimed, now claims and will claim that he has suffered total and permanent disability and is entitled to a maximum recovery of $14,035, which, of course, is in excess of the $10,000 requisite to give a federal court jurisdiction of this controversy. *No denial of these allegations in the complaint has been made, no attempted disclaimer or surrender of any part of the original claim has been made by petitioner, and there has been no other showing, let alone a showing "to a legal certainty," of any lack of good faith on the part of the respondent in alleging that a $14,035 claim is in*

> *controversy*. It would contradict the whole record as well as the allegations of the complaint to say that this dispute involves only $1,050. The claim before the Board was $14,035; the state court suit of petitioner asked that much; the conditional counterclaim in the federal court claims the same amount. Texas law under which this claim was created and has its being leaves the entire $14,035 claim open for adjudication in a *de novo* court trial, regardless of the award. Thus, the record before us shows beyond a doubt that the award is challenged by both parties and is binding on neither; that petitioner claims more than $10,000 from the respondent and the respondent denies it should have to pay petitioner anything at all. No matter which party brings it into court, the controversy remains the same; it involves the same amount of money and is to be adjudicated and determined under the same rules. Unquestionably, therefore, the amount in controversy is in excess of $10,000. (Emphasis added)

One thing appears clearly from the foregoing language; and that is, that the amount of the award does not fix the amount in controversy between the parties when the insurer brings suit to "set aside" the award. This is because the mere filing of suit by the insurer absolutely nullifies the award, so that its amount can never be said to be "in controversy" in the action. Indeed, the mere mention of the nature or amount of the award during the trial has been held to be prejudicial error by the Texas Courts. *Fidelity Union Casualty Co. v. Klatt,* 47 S.W.2d 417.

We interpret Horton to prescribe the following test for determining whether federal jurisdiction exists when

an insurer brings suit to "set aside" an award of the Texas Industrial Accident Board: If the insurer alleges that the insured has claimed compensation in excess of $10,000 before the Board and that the insured will claim compensation in excess of $10,000 in the court action to "set aside" the award, federal jurisdiction exists *unless* the insured denies the allegation that he will seek more than $10,000 in the court action and makes an affirmative claim for compensation for a sum which does not exceed $10,000.

We realize of course, that such a rule gives the insured the power to defeat federal jurisdiction simply by asserting a claim for less than $10,000 after he is brought into court by the insurer. But, however much this may depart from traditional notions of pleading federal jurisdiction, the procedure for "setting aside" an award established by the Texas Compensation Law leaves no satisfactory alternative. The Texas Compensation Law permits any interested party, including, of course, the insurer, to bring suit to "set aside" the award of the Industrial Accident Board. As noted previously, however, once such an action is commenced, the award becomes an absolute nullity under the Texas statute. The filing of the suit, in and of itself, abrogates the award, and this is so even if a voluntary nonsuit is taken and the case dismissed without judgment on the merits. See *Zurich General Accident Co. v. Rodgers*, 97 S.W.2d 674; *Texas Reciprocal Ins. Ass'n. v. Leger*, 97 S.W.2d 677. The insurer is under no obligation to prove that the award was erroneous, even though the insurer's action is designated as an action to "set aside" the award. To the contrary, once an action such as this is filed, a trial *de novo* is conducted, and the burden is on the *insured* (here, the defendant) to plead and prove whether and to what extent he is entitled to compensation. Thus, when the insurer institutes such

an action, it is a "plaintiff" in name only. The filing of suit by the insurer is nothing more than a notice to the insured to come into court and prove his claim.

Thus it is that the amount actually in controversy in the action cannot be determined until the insured responds to this notice by filing a claim for compensation against the insurer. The insured's "counterclaim" is, for all intents and purposes, the *only* claim involved in the action. If the insured asserts a claim for compensation for a sum which does not exceed $10,000, it then becomes clear to a legal and mathematical certainty that the amount in controversy is less than the jurisdictional requisite. Under no circumstances, can the insured recover more than $10,000 in the suit. This being so, there is no federal jurisdiction.

The appellant argues that the amount in controversy can best be determined by looking to the amount claimed by the insured before the Industrial Accident Board. For one thing, it does not appear that the test suggested by the appellant was adopted by the Supreme Court in Horton. For another, assuming the question was an open one, we think the rule proposed by the appellant has little to recommend it.

In Horton, the Supreme Court specifically noted that we are not bound by the Texas rule which, in certain cases, provides that the amount in controversy is fixed by the amount claimed by the insured before the Industrial Accident Board. After so noting, the Court did not say that we should adopt this rule as a matter of federal law. Rather, the Court went to some lengths to point out that the insurer in that case had alleged that the insured had claimed and *would claim* in excess of $10,000, and that the insured had made "no denial of these allegations." If the Court had meant to adopt the test urged by the appellant

here, it could have done so in plain and simple language. In that event, we think, the opinion would not have emphasized, as it did, that the *insured* was vigorously asserting a claim for compensation for a sum exceeding the jurisdictional amount. In short, we do not think that the majority opinion in Horton is fairly susceptible to the interpretation which the appellant places upon it.

Moreover, it seems to us that the rule proposed by the appellant has at least two serious shortcomings. First of all, the Texas Compensation Law does not require an insured to claim a specific sum of money before the Industrial Accident Board; nor does it even require him to state sufficient facts from which the amount claimed can be definitely be determined. *Booth v. Texas Employers' Inc. Ass'n,* 123 S.W.2d 322. Thus, if the rule suggested by the appellant was adopted, it would be impossible to fix the amount in controversy in a case where the insured did not claim a specific sum before the Board and did not state sufficient facts from which the amount claimed could be determined. Since the latter situation is apparently of common occurrence, appellant's suggested test would have rather limited utility.

Secondly, the Texas law is clear that the insured is not ordinarily bound by the amount which he claims before the Board. Where, as here, the claim is for general injuries suffered, the insured, in a court action to "set aside" the award, can increase the amount of his claim to include compensation for all injuries proximately resulting from the accident. *Booth v. Texas Employers' Ins. Ass'n, supra.* Similarly the insured can reduce the amount of his claim if he sees fit to do so. Thus, the amount of the claim before the Board is hardly a reliable indicator of the amount actually in controversy in the federal court action.

The appellant contends that it would be unfair to permit the insured to defeat federal jurisdiction by claiming less than the jurisdictional amount in the action, since the insured would then be free to assert a claim for more than $10,000 in a state court action and the insurer would be unable to remove to a federal court because of the Congressional ban on the removal of state workman's compensation cases. See 28 U.S.C. §1332. Of course, the simple answer to this is that, regardless of any possible unfairness a federal court does not have jurisdiction in a diversity case unless the amount in controversy exceeds the sum of $10,000. Appellant's argument would be equally applicable, and equally unavailing, in numerous other cases where the amount in controversy does not reach the federal standard. For example, suppose a plaintiff brought suit against a defendant for $5,000 and alleged that the defendant had a compulsory counterclaim against the plaintiff for $15,000. Certainly, the defendant would be entitled to have the case dismissed for want of jurisdiction, even though the defendant could then bring suit for $15,000 in a state court and the case could not be removed because the suit was commenced in the original plaintiff's home district. However real the possibility of losing an opportunity to have the case tried in a federal court, it cannot vitiate the fact that the amount in controversy in an action such as the instant one is the amount claimed by the insured in the action and that, where the amount there claimed does not exceed $10,000, the federal standard has not been met. We might note, on the other hand, that if an insured subsequently sues in a state court for more than $10,000, he would probably have some difficulty overcoming the effect of his previous judicial admission that he was not entitled to more than $10,000. This may well afford all the protection the insurer needs.

In the present case, it appears that the appellee did not claim more than $10,000 before the Industrial Accident Board and that he counterclaimed for $9000 in the action commenced by appellant. The District Court, in a decision rendered before the Supreme Court's decision in Horton, dismissed the appellant's action on both the above grounds. For the reasons heretofore stated, we think dismissal was justified on the sole ground that the appellee's claim in the action was for less than $10,001. The judgment is, therefore,

AFFIRMED.

HUTCHESON, Circuit Judge, Dissenting:

I would simply "reverse on the authority of the *Horton* cases." As I read these cases, which are controlling here, it is quite plain that Judge Fisher's holding in this case, that federal jurisdiction did not exist, is not supported by the holding in those cases, that *the claim of the insurance carrier determines federal jurisdiction unless the amount in controversy stated by it is found to a legal certainty to be not stated in good faith.* Judge Fisher's finding in this case that, though the plaintiff sued in the state court for $12,827, he could, by limiting his counter-claim in federal court to $9000, defeat the jurisdiction as asserted in the insurer's *suit, in my opinion, goes directly counter to the holding of the Horton cases,* and his judgment must be reversed, not affirmed.

I respectfully DISSENT from the opinion of the majority.